Supreme Court, U.S.
FILED

No. 021690 MAY 15 2003

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In The

Supreme Court of the United States

STEPHEN K. LESLIE,

Petitioner,

vs.

ICA CONSTRUCTION CORPORATION, ICA INTERNACIONAL, EMPRESAS ICA, SOCIEDAD CONTROLADORA, AND BRIAN HOLT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals abridge Leslie's Seventh Amendment right to a jury trial and his Fourteenth Amendment right to procedural due process when it affirmed the dismissal of his claims below on the grounds that the bankruptcy order was not a final appealable order?

2. Did the Court of Appeals err by denying Leslie's motion for reconsideration where the public interest supports his Seventh Amendment right to a jury trial in circumstances where the result is a departure from the accepted and usual course of judicial proceedings?

LIST OF PARTIES

PLAINTIFF:	Stephen K. Leslie
PLAINTIFF'S ATTORNEY:	David K. Sergi SERGI & ASSOCIATES, P.L.L.C. 109 East Hopkins, Suite 200 San Marcos, Texas 78666 512/392-5010
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DEFENDANTS' ATTORNEY:	Jean Tepper LAW OFFICES OF ROBERT E. WHITE 177 Post Street, Suite 890 San Francisco, CA 94108 415/788-6151
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[1] In accordance with Supreme Court Rule 29.6, Petitioner is not aware that any of the Defendant corporations are publicly traded or are owned 10% or more by another corporation.

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PETITION FOR WRIT OF CERTIORARI

Stephen K. Leslie, Petitioner, respectfully submits this Petition for Writ of Certiorari seeking review of the opinion issued in this case on February 14, 2003, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is found at *Leslie v. ICA Construction Corporation, et al.,* 2003 WL 356167 (9th Cir. [Calif.] 2003) and the district court opinion is *Leslie v. Holt, et al.,* 2001 WL 1602691 (U.S. DC N.D. California, 2001) and reference is made to *Leslie v. Grupo ICA, et al.,* 198 F.3d 1152 (9th Cir. 1999).

JURISDICTION

The February 14, 2003 opinion of the Ninth Circuit at 2003 WL 356167 is appealed to this Court pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to a jury trial found in the Seventh Amendment to the United States Constitution which is reproduced below:

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right

> of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

This case also involves the due process clause found in the Fourteenth Amendment to the United States Constitution.

ARTICLE XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

On June 1, 1994, Petitioner Leslie ("Leslie") filed a breach of contract action against Respondent ICA Construction Company, et al. ("ICA") in California state court. ICA was accused of breaching a contract with Leslie by which ICA was to pay Leslie both a flat fee of $100,000 and a second fee based on a percentage of the joint venture which Leslie facilitated between ICA and Perini Corporation. ICA removed this state court action to the Northern District of California. In the federal district court, ICA filed its motion for summary judgment and, Leslie filed

response thereto. Leslie was accused of fabricating evidence in his Response in conflict with prior correspondence. The district court judge awarded ICA costs and attorney's fees in excess of $428,000.

The Ninth Circuit Court of Appeals reversed and remanded the case to the district court. The Court of Appeals did not, however, render any opinion on the issue of attorney's fees and costs that were part of the original sanctions.

Thereafter, the federal district judge vacated the now inconsistent award of attorney's fees. However, in the time between the appeal being resolved, Leslie filed a bankruptcy court action seeking to stay the collection by ICA of the $428,000 sanction of fees and costs pending resolution of his appeal of those very issues concerning the sanctions to the Ninth Circuit. Following the Ninth Circuit's ruling reversing the sanctions, Leslie expected the bankruptcy court to dismiss the pending bankruptcy since this claim was the only one which had not been reaffirmed. Leslie's Motion to Dismiss the bankruptcy was denied and, far worse, the bankruptcy court permitted the Trustee to settle Leslie's claims against ICA, which on his proof of claim had been listed at $6,000,000, in exchange for an offset of the $428,000 sanction order (which had now been reversed), plus an additional $75,000 and an agreement to withdraw all counterclaims and demands for fees. The bankruptcy court, on December 6, 2000, denied Leslie's motion to dismiss the bankruptcy and simultaneously granted the trustee's motion to compromise Leslie's claims against ICA; and on December 12, 2001, the district court, on appeal of the bankruptcy court's decision, approved both the denial of Leslie's motion to dismiss and the

settlement recommended by the trustee of Leslie's claims – all without a jury trial.

That order was appealed to the Ninth Circuit Court of Appeals and on February 14, 2003, the Ninth Circuit issued its order affirming the dismissal of Leslie's claims by the bankruptcy court and the district court, finding no appealable order and that all issues had been resolved, rendering the appeal moot.

B. BASIS FOR FEDERAL JURISDICTION IN THE COURT BELOW

At the time of the removal from state court of Leslie's claims against ICA, there was diversity of parties and removal was appropriate under 28 U.S.C. §1441(a). Thereafter, the federal district court's order of December 12, 2001 was appealed to the Ninth Circuit and the Ninth Circuit order of February 14, 2003 was appealed to this Court, pursuant to 28 U.S.C. §1254. However, after the sanctions were reversed in 1999, the Bankruptcy Court and the District Court lacked jurisdiction since there was no longer any ICA debt to administer.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit Court's decision affirming the dismissal of Leslie's claims as moot based on the contention that the bankruptcy court order was not a final judgment is in conflict with the decisions of this Court and the courts of appeals that hold an order disposing of all claims in the bankruptcy litigation is a final, appealable order.

Leslie acknowledges that most bankruptcy courts have held that denial of a motion to dismiss is generally not appealable, *Kelly Howe and Scott v. Giguere,* 188 Bankr. R. 486 (D.R.I. 1999) citing *In re Warner,* 94 Bankr. R. 734 (M.D. Fla. 1998). However, there are many exceptions to the general rule of non-appealability of the denial of a motion to dismiss a bankruptcy case. For example, 28 U.S.C. §158(a) provides, in part, that the district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders and decrees;

(2) from interlocutory orders and decrees issued under §1121(d) of Title 11 increasing or reducing the time periods referred to in §1121 of such title; and

(3) with leave of court, from interlocutory orders and decrees of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under §157 of this title.

Among the many kinds of bankruptcy orders arising under Title 11 that have been held to be final, is an order approving the sale of property of the estate, *In re Sax,*, 796 F.2d 996 (7th Cir. 1986); *Sulemyer v. Karbach Enters,* 715 F.2d 1401 (9th Cir. 1983); an order for relief *Mason v.*

Integrity Insurance Co., 709 F.2d 1313 (9th Cir. 1983); and an order substantively consolidating non-debtor corporations with the bankruptcy estate of a Chapter 7 debtor *In Re Bonham,* 229 F.3d 750 (9th Cir. 2000). Thus, it is a final, appealable order where a bankruptcy court order affects the substantive rights of the parties and can cause irreparable harm if the losing party must wait to appeal until the estate's assets are distributed and the bankruptcy proceeding terminates, *Bonham, id.* at 762 (citing Advisory Committee Note to Bankruptcy Rule 1015); *In Re Allen,* 896 F.2d 416, 418-419 (9th Cir. 1990).

Although 11 U.S.C. §707(a) governs the dismissal of cases filed under Chapter 7, these provisions cannot trump rights protected under the Constitution when enforcement of the terms of that section would violate the debtor's right to a jury trial under the Seventh Amendment and his due process rights under the Fourteenth Amendment to the United States Constitution.

A Chapter 7 case can be dismissed on other grounds as well. *In re Garrow,* 50 Bankr. R. 796 (BC DC Vt. 1985); *In re Sacramento Metro Real Estate Investors,* 10 Bankr. Ct.'s Dec. 422 (BC ED Cal., 1983). Dismissal will normally be granted when there is no prejudice to other interested parties. *Hammerer v. IRS,* 18 Bankr. R. 524 (BC ED Wis. 1982).

The "good cause" test inherent in §707 hinges on whether dismissal is in the best interest of both the debtor and the creditors. The best interest of the debtor hangs on the notion of whether or not the debtor can secure an effective "fresh start" and a reduction of his administrative expenses if dismissed. The interest of the creditors requires a look for prejudice. *In re Schwartz,* 58 Bankr. R. 923 (BC SD NY 1986). Prejudice to creditors amounts to

an unreasonable delay or a defeat of any chance of recovery, *In re Carroll,* 24 Bankr. R. 83 (BC ND Ohio 1982). In searching for a good cause for dismissal, bankruptcy courts should look to the general principals, including a balancing of the interests herein described, *In re Heatley,* 51 Bankr. R. 518 (BC ED Pa. 1985).

When deciding if a bankruptcy court is final, and comparing the analogous provisions of 28 U.S.C. §1291 for a district court orders, this Court has held that "under §1291 an appeal may be taken from 'final' order of a district court."

As this Court often has pointed out, a decision is "final" within the meaning of §1291 even though it is not the "last" order possible to be made in a case. *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 85 S.Ct. 308, 311 (U.S. 1964).

Turning to the bankruptcy rules, the Ninth Circuit has previously held that "[a] bankruptcy court order is final and thus appealable 'where it (1) resolves and seriously affects substantive rights and (2) finally determines the discreet issue to which is it addressed' . . . [a]lthough this finality rule is given additional flexibility in the bankruptcy proceedings context, traditional finality concerns nonetheless dictate 'we avoid having a case make two complete trips through the appellate process'". *Law Offices of Nicholas A. Franke v. Tiffany,* 113 F.3d 1040, 1043 (9th Cir. 1997).

Likewise, in *In re Prestige Limited Partnership-Concord,* 234 F.3d 1108, 1113 (9th Cir. 2000) the court held that

> in bankruptcy proceedings the rules of finality developed under the general rule of appellate jurisdiction provided in 28 U.S.C. §1291 are given a flexible reading . . . we therefore use a 'pragmatic approach' to finality in bankruptcy because certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of the individual parties or to the ultimate outcome of the case that final decisions as to them should be appealable as of a right . . . this approach has led us to exercise jurisdiction over appeals from bankruptcy court orders denying summary judgment. *Id.*

In *Prestige,* the Ninth Circuit treated the District Court's order which overruled the debtor's objections to the lender's claim as being "sufficiently conclusive to be appealable," *Prestige, id.* at 1113.

In the instant case, Leslie sought dismissal of the bankruptcy case against him after the district court vacated the award of attorney's fees and costs against him. Other than the ICA claim, which now was void as a result of that order of vacation by the district court, Leslie had no other significant debts and in fact had reaffirmed his obligations to repay his remaining debts.

ICA would not have been prejudiced by the dismissal of the bankruptcy case, because its claim had now been rendered worthless by virtue of the district court's order vacating the sanction.

Balancing the equities of the worthless ICA claim against the right to a jury trial to determine the damages owed to Leslie as guaranteed under the Seventh Amendment to the U.S. Constitution demonstrates the error of the courts below in refusing to grant Leslie's Motion to

Dismiss after the original sanctions and costs order was vacated by the district court.

II.

THE NINTH CIRCUIT COURT'S DECISION TO AFFIRM DISMISSAL OF LESLIE'S CLAIMS IS A SERIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE IT PERMITS AN INVALID BANKRUPTCY CLAIM TO VOID LESLIE'S SEVENTH AMENDMENT TO A JURY TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

The Ninth Circuit's decision that Leslie's appeal was moot is wrong because Leslie's situation is capable of repetition yet evading review, *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 124, a "reasonable expectation does not equate to demonstrable probability, *Murphy v. Hunt,* 455 U.S. 478, 102 S.Ct. 1181. The concern is not whether a recurrence of the specific is more probable than not, but whether it is capable of repetition *Honig v. Doe,* 484 U.S. 108 S.Ct. 592.

Here it is apparent that an important public interest is at stake since respondents have used procedural circumstances to deny Leslie his Seventh Amendment right to a jury trial and his Fourteenth Amendment right to due process.

By analogy, this Court in *Storer v. Brown, et al.,* 415 U.S. 724, 94 S.Ct. 1274, 1282 (1974) held that a challenge to the state election code was not moot by virtue of the fact that the election had already occurred by the time the appeal had reached this court since this issue was "capable of repetition yet evading review" and the case would have

had the effect of simplifying future challenges" *Id.*, at 1282, 737.

For Seventh Amendment treatment of "suits at common law" this applied to suits "in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights were to be recognized, and equitable remedies were administered . . . the Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 708-709, 119 S.Ct. 1624, 1638 (U.S. 1999); *Murphy v. Hunt,* 455 U.S. 478, 102 S.Ct. 1181 (U.S. 1982). This court decided as to the mootness exception of "capable of repetition, yet evading review" that it was in prisoner cases such as *Murphy* "limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again," *Murphy, id.* at 1183. Yet, even in *Murphy* this Court recognized that in situations where a matter is not resolved, even though the particular issue is, nevertheless, the mootness exception capable of repetition yet evading review is applicable, *see e.g., Nebraska Press Association v. Stewart,* 427 U.S. 539, 96 S.Ct. 2791 (U.S. 1976) and cited at page 1184 of *Murphy.*

The Ninth Circuit's reliance on *Public Utilities Commission of the State of California v. Federal Energy Regulatory Commission,* 100 F.3d 1451, 1459 (9th Cir. 1996) is in apposite to the facts of this case, because in *Public Utilities,* the Ninth Circuit found it impossible for the two conditions of a duration too short and expectations of the complaining party being subjected to the same action

again could not apply under the circumstances of that case where the investor lost "millions of dollars because of adverse economic circumstances." That is hardly comparable to Leslie's situation where, as a result of the bankruptcy court's and district court's and Ninth Circuit's dismissal, his entire breach of contract claims against ICA were foreclosed by the Court's actions in dismissing the claims. Unlike the parties in *Public Utilities,* Leslie has every reason to continue pressing his claims against ICA and it was unfair to Leslie to lose those claims in order for the bankruptcy court judge to offset a void counterclaim for attorney's fees (that had already been reversed by the Ninth Circuit). Likewise, the Ninth Circuit opinion in *Cammermeyer v. Perry,* 97 F.3d 1235, 1238 (9th Cir. 1996) is not availing where the National Guard acknowledged that the original discharge should not have occurred under the regulation in effect at that time – thus making the original action an impossibility to repeat.

This Court addressed this issue in *Honig v. Doe,* 484 U.S. 305, 108 S.Ct. 592 (U.S. 1988) in contrasting the relative merits of the positions of the respondent John Doe who was too old to continue in the program as opposed to respondent Jack Smith, who was still young enough to participate in the program for one more year. This Court held in that circumstance that John Doe's claims were moot because he was too old, while simultaneously not finding Smith's claims moot even though his situation had changed by the time of appeal. Likewise in the instant case, Leslie's $6,000,000 claim against ICA is still viable should this Court reverse the Ninth Circuit's opinion on mootness. This is not a situation like *Honig* where following reversal, Leslie could not pursue his claims against ICA. Nor, is this a case like *Public Utilities* where plaintiff

has exhausted all its resources and can no longer afford to pursue its remedies.

Leslie is now at his last appeal and respectfully requests this Court to review this case by granting Certiorari.

CONCLUSION

For the foregoing reasons the Petition of Writ for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. *Leslie v. Grupo ICA, et al.*, 198 F.3d 1152 (9th Cir. 1999) ..... App. 1

B. 6/30/00 District Court Order ..... App. 3

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APPENDIX A

2003 WL 356167 (9th Cir.(Cal.))

United States Court of Appeals,
Ninth Circuit.

Stephen K. **LESLIE**, Appellant,
and
ICA Construction Corporation; ICA Internacional; Empresas ICA; Sociedad Controladora, Creditors-Appellees,
v.
Brian HOLT, Appellee.

No. 02-15072.
D.C. No. CV-00-04719-SC.

Submitted Feb. 12, 2003.*
Decided Feb. 14, 2003.

Appeal from the United States District Court for the Northern District of California, Samuel Conti, District Judge, Presiding.

Before TROTT, RYMER and TALLMAN, Circuit Judges.

MEMORANDUM**

Stephen K. Leslie appeals from the district court's December 12, 2001 order affirming the bankruptcy court's

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* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

denial of Leslie's motion for reconsideration of the bankruptcy court's refusal to dismiss the Chapter 7 bankruptcy proceeding initiated by Leslie. We dismiss the appeal as moot.

Leslie concedes that the sole reason for seeking dismissal of his bankruptcy case – which is the only issue on appeal – is to pursue a separate lawsuit filed against **ICA Construction Corporation** (ICA). However, the bankruptcy trustee appointed to administer Leslie's bankruptcy estate settled the ICA litigation and that action has been dismissed with prejudice. No stay was obtained. Nevertheless, Leslie argues this his appeal is not moot because the matter appealed from is "capable of repetition, yet evading review," is of public interest, and will have collateral consequences. But there is no reasonable chance of his being subject to the same kind of order again. *See Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1460 (9th Cir.1996) ("When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot."). Nor are other debtors likely to face anything similar. Finally, Leslie identifies no cognizable collateral consequences. As there is no effective relief to be granted, the appeal is moot.

APPEAL DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN K. LESLIE, dba INTERNATIONAL PROJECTS DEVELOPMENT,

Plaintiff,

v.

GRUPO ICA, ICA CONSTRUCTION CORP., ICA INTERNATIONAL, S.A. de C.V., ANDRES CONESA RUIZ, EMPRESAS ICA, SOCIEDAD CONTROLADORA, S.A. de C.V.,

Defendants.

/

No. C-94-3059-VRW

ORDER.

(Filed Jun. 30, 2000)

Plaintiff moves to set aside an order awarding attorney fees and costs.

The underlying breach of contract action arises from a disagreement over compensation allegedly due to plaintiff Stephen K. Leslie for assistance he provided in arranging a joint-venture agreement between defendants and an United States construction company. Defendants are several related Mexican construction concerns. Plaintiff originally filed this action pro se in June, 1994, in California state court. Defendants removed the action in August, 1994.

The parties are familiar with the tortured history of this case and the court need not repeat it in full for purposes of the present motions. It is sufficient to note that plaintiff and his various counsel have repeatedly

disrespected the court, its orders and rules. As a result, the court has imposed sanctions on several previous occasions.

On August 6, 1997, this court granted defendants' motion for summary judgment because it concluded after extensively reviewing letters concededly written by plaintiff that plaintiff's deposition testimony and the sole letter that supported it could not create an issue of fact for any reasonable jury. Plaintiff subsequently filed a motion for a new trial and relief from judgment, which was denied. Plaintiff also field a motion to recuse the undersigned because the court's August 6, 1997, order purportedly showed that the undersigned could not be impartial. This motion also was denied.

Defendants then moved for an award of attorney fees and costs under California Civil Code § 1717 and under the court's inherent power to award sanctions based on bad faith litigation. The court's January 26, 1998, order granted this motion, awarding $428,421.49 to ICA against plaintiff under § 1717. The court found David Sergi and Timothy Perry, attorneys for plaintiff, jointly and severally liable for a portion of ICA's fees and expenses in the amount of $228,069.44 as sanctions for bad faith litigation.

Plaintiff appealed to the Ninth Circuit from the judgment entered in favor of defendants' motion for summary judgment. The appeals court reversed this court's order granting summary judgment "because a party's consistent deposition testimony and sworn declaration supporting his claim and explaining inconsistent unsworn statements must be credited." *Leslie v Grupo ICA*, 198 F3d 1152, 1160-61 (9th Cir 1999).

Plaintiff's notice of appeal from the award of attorney fees was not timely filed and was dismissed on jurisdictional grounds. Thus, the appeals court did not review the court's decision on the attorneys' fees.

California Civil Code § 1717 provides that the prevailing party in an action for breach of contract containing an attorney fees clause shall be entitled to recover its reasonable attorney fees and expenses. *See* Cal Civ Code § 1717. Both plaintiff and defendants agree that defendants are no longer the prevailing party because the motion for summary judgment was reversed and a fee award on that basis is, therefore, inappropriate.

The remaining dispute is over the attorney fees awarded as sanctions in the amount of $228,069.64 against plaintiff's counsel. This sanction was issued by the court through the court's inherent authority to sanction for bad faith. Federal courts have the inherent power to assess attorney fees when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v NASCO, Inc.,* 501 US 32, 45 (1991). The award here was based on the attempt to perpetrate a fraud on the court by means of a fake piece of evidence.

Plaintiff contends that the award should not stand since the judgment was reversed on appeal. Citing *Great Hawaiian Financial Corp v Aiu,* 863 F2d 617 (9th Cir 1988) as being "nearly on all fours," plaintiff asks that the award be set aside. In *Great Hawaiian*, Rule 11 sanctions were awarded by the district court on the basis that a motion for reconsideration was frivolously filed. On appeal, the motion was determined not to be

frivolous, thereby making the sanctions inappropriate. Plaintiff's counsel was sanctioned because of the court's disbelief of plaintiff's assertions in his deposition and sworn declaration. The appeals court ruled that disbelief was not enough to support summary judgment, and instead must be resolved at trial.

Under FRCP 60(b)(5) the court may relieve a party or a party's representative from a final judgment or order if "* * * a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." FRCP 60(b)(5). "Rule 60(b)(5) is available if a party seeks relief solely on the ground that the underlying merits judgment is reversed." *California Medical Ass'n v Shalala,* 207 F3d 575, 577 (9th Cir 2000). In that case, reversal of a judgment under 42 USC § 1983 had the effect of extinguishing the basis for a fee award made under 42 USC § 1988. When the district court refused to set aside the fee award, the appeals court held that the district court abused its discretion.

This case is different. The fee award against plaintiff's counsel did not rest on defendants having prevailed on the merits. Rather the award was premised upon counsel's bad faith conduct. Plaintiff did not timely appeal this award and the court of appeals held that it lacked jurisdiction to review the matter on plaintiff's untimely appeal.

Defendants argue that sanctions are appropriate because the basis for issuance was bad faith throughout the course of litigation. Although the sanctions under the courts inherent authority were issued for bad faith,

it was for bad faith regarding the alleged fraud, not for other actions during the course of the proceedings.

The bad faith conduct to which defendants point, and upon which the court relied in making its award, revolve around plaintiff's October 28, 1991, letter that the court characterized as a "fake." Although the court of appeals in no way suggested that the court's characterization of the letter as bogus was incorrect factually, the appeals court held that this letter did create a disputed issue of material fact that precluded summary judgment. It is difficult to square this appellate result with the predicate for the court's fee award, namely that plaintiff's counsel had proceeded in bad faith in pressing plaintiff's claims. Accordingly, the court concludes that the fee award must be set aside at this time. Of course, should defendants prevail at trial or otherwise, defendants may be able to recover these fees and any others incurred in resisting plaintiff's claims.

Accordingly, the court GRANTS plaintiff's motion to set aside the January 26, 1998, order awarding attorney fees and costs.

IT IS SO ORDERED.

Jun 29 2000

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States
District Judge

APPENDIX C

GOLDBERG, STINNETT, MEYERS & DAVIS
A Professional Corporation
DENNIS D. DAVIS, ESQ. 070591
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Attorneys for Trustee
Brian A. Holt

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re STEPHEN K. LESLIE, Debtor.	Case No. 99-32939-HTC Under Chapter 7

ORDER GRANTING TRUSTEE'S MOTION TO COMPROMISE CONTROVERSY WITH GRUPO ICA, ET AL.

(Filed Dec. 6, 2000)

The Trustee's Motion for an order authorizing settlement with Grupo ICA Construction Corporation, ICA International, S.A. de C.V., and Empresas ICA, Socieded Controladora, S.A. de C.V. (collectively "ICA") came on for hearing before the Honorable Thomas E. Carlson, United States Bankruptcy Court Judge, at San Francisco, California.

The Court having considered the papers filed by the parties and oral argument, and having made its Findings of Fact and Conclusions of Law on the record;

IT IS HEREBY ORDERED:

1. The trustee's Motion is approved and the trustee may enter into the proposed settlement with ICA;

2. The Court grants the debtor's Motion for a temporary stay on the following terms and conditions:

a. debtor must file his motion for stay pending appeal with the appropriate court by December 7, 2000, this stay of enforcement of the settlement order expires January 15, 2001 or when the appellate court rules on debtor's motion for a stay, whichever occurs first.

DATED: December 5, 2000

/s/ Thomas E. Carlson
THE HONORABLE
THOMAS E. CARLSON
United States
Bankruptcy Judge
GH

APPROVED AS TO FORM AND CONTENT:

DATED: December ____, 2000

THE LAW OFFICES OF
ANTHONY J. PALIK

By: _____
ANTHONY J. PALIK ESQ.
Attorney for Debtor,
Stephen K. Leslie

APPENDIX D

2001 WL 1602691 (N.D.Cal.)

United States District Court, N.D. California.

Stephen K. LESLIE, Appellant,

v.

Brian A. HOLT, Trustee in Bankruptcy For The Estate of Stephen K. Leslie, Appellee.

No. C 00-4719 SC.

Dec. 12, 2001.

ORDER AFFIRMING BANKRUPTCY COURT HOLDING

CONTI, District J.

I. *INTRODUCTION*

In a previous action, Appellant Stephen K. **Leslie** ("Appellant"), sued **Grupo** ICA ("ICA") for breach of contract. As a result of an unfavorable summary judgment decision and sizable attorneys' fee award in that case, Appellant was forced to file for bankruptcy protections under Chapter 13 of the Bankruptcy Code, which he later converted to Chapter 7. Subsequently, the summary judgment was reversed and the attorneys' fee award vacated. Appellant then moved the Bankruptcy Court to dismiss his bankruptcy proceedings, but the court declined to do so.

The Chapter 7 trustee for Appellant's estate ("Appellee"), being placed in control of Appellant's affairs, negotiated a settlement of the original lawsuit with ICA and moved the Bankruptcy Court for approval of the settlement. Concurrently, Appellant filed a Motion for Reconsideration of the

Bankruptcy Court's refusal to dismiss the bankruptcy proceedings.

Appellant's Motion for Reconsideration and Appellee's Motion to Approve the Settlement were consolidated and argued together before the Bankruptcy Court. The Court ultimately denied the Motion for Reconsideration and approved the settlement.

Appellant now appeals both of these decisions to this Court. For the reasons stated below, the appeal is denied and the decision of the Bankruptcy Court is affirmed in full.

II. *BACKGROUND*

The tortured history of this case demands a brief retelling.[1] On June 1, 1994, Appellant filed a breach of contract action against ICA in California state court. Appellant claimed that ICA had breached a set of agreements to compensate him for facilitating a joint venture between ICA and Perini Corporation. In particular, he claimed that he was due a flat fee of $100,000 and a second fee based on a percentage of the first project undertaken by the joint venture, which came to more than $1.2 million.

Appellant's action was removed to the United States District Court for the Northern District of California and was assigned to Judge Vaughn Walker. During discovery, a number of letters written from Appellant to ICA were

[1] The facts pertaining to the underlying litigation are largely summarized in ***Leslie v. Grupo ICA***, 198 F.3d 1152 (9th Cir. 1999).

produced, in which Appellant had specifically stated that although this type of agreement often entailed a fee based on a percentage of the first job, in this case the parties were agreeing to a flat fee of $50,000 – $80,000. *See* ***Leslie v. Grupo ICA,*** 198 F.3d 1152, 1155 (9th Cir. 1999). These correspondence, which were multiple and directly on point, so starkly contradicted Appellant's declarations as to convince Judge Walker to disregard those declarations under the so-called "sham-affidavit rule" and to award summary judgment to ICA. Judge Walker wrote, "the only reasonable conclusion to be drawn from the evidence in this case is that Leslie has committed perjury and manufactured evidence." *Leslie,* 198 F.3d at 1156 (quoting the district court opinion). Additionally, Judge Walker-awarded ICA costs and attorneys' fees in excess of $428,000. According to Appellant, it was this sizeable fee award that forced him to seek bankruptcy protections.

On appeal of Judge Walker's order, the Ninth Circuit reversed the summary judgment, reasoning that the sham-affidavit rule only applied where the evidence contradicting the affidavit was also under oath. *See id.* at 1157-59. Because Appellant's sworn declarations were only contradicted by his unsworn letters to ICA, summary judgment was deemed improper. The Court noted, however, "we can understand the district court's disbelief of Leslie's assertions in his depositions and sworn declaration." *Id.* at 1159. The Ninth Circuit did not address the assessment of attorneys' fees, as the appeal on that award was untimely, thereby depriving the appellate court of jurisdiction on that issue. *See id.* at 1160.

After the Ninth Circuit's reversal of summary judgment, Appellant petitioned Judge Walker to vacate the now inconsistent award of attorneys' fees, which Judge

Walker agreed to do. (Appendix to Appellant's Opening Brief ("A.A.") at 149-53.) Thereafter, Appellant moved the Bankruptcy Court to dismiss his bankruptcy on the basis that there was no longer any debt to administer. (A.A. at 121-124.) Appellee opposed the motion on the ground that Appellant had administrative expenses left to be paid. (A.A. at 129-30.) ICA also opposed the motion, arguing that it would ultimately prevail in the vexatious litigation Appellant had filed against it, and would be prejudiced if Appellant were allowed to dispose of his assets before that suit was resolved. (A.A. at 133.) The Bankruptcy Court denied Appellant's Motion to dismiss on August 31, 2000.

On October 3, 2000, Appellant filed a Motion for Reconsideration of the Bankruptcy Court's decision not to dismiss his bankruptcy proceedings. (A.A. at 139-44.) That motion was opposed by both the trustee and ICA, principally on the basis that there were no grounds for reconsideration, given that Appellant offered no new evidence. (A.A. at 186-98.)

During this time period, Appellee, acting as trustee for Appellant's estate, negotiated a settlement with ICA on the original litigation. Pursuant to that settlement, ICA was to pay Appellant $75,000 and withdraw all counterclaims and demands for fees. On or about November 9, 2000, the trustee moved the Bankruptcy Court to approve the settlement. (A.A. at 214-22.)

These motions were argued together before the Bankruptcy Court on December 1, 2000. On the record, the court ruled that it would deny the Motion to Reconsider and approve Appellee's settlement with ICA. These orders are the subject of the present appeal.

III. *DISCUSSION*

A. Appellant's Motion for Reconsideration was properly denied.

Both parties agree that the Bankruptcy Court's decision to deny the Motion for Reconsideration may be reversed only if it represents an "abuse of discretion." *See e.g., In re Nunez,* 196 B.R. 150, 155 (9th Cir. B.A.P.1996); *In re Hammer,* 112 B.R. 341, 345 (9th Cir. B.A.P.1990). As Appellee points out, Appellant *did not appeal* the denial of his initial motion to dismiss the bankruptcy. Such an appeal was required to be filed, if at all, within ten days of the Bankruptcy Court's decision. *See* Fed. R. Bankr.P. 9023 *adopting the standards of* Fed.R.Civ.P. 59(e). Instead, nearly one month after the deadline for filing such an appeal had passed, he filed a Motion for Reconsideration on the basis of letters from two of Appellant's creditors, Messrs. Dixon and De Kalb, asking that the bankruptcy not be prosecuted on their behalf. (Compare A.A at 126 with A.A. at 146.)

Federal Rule of Civil Procedure 60(b), as incorporated into the Bankruptcy Code as Rule 9024, enumerates the bases on which a party may seek a Motion for Reconsideration. Under that Rule, a motion will be considered only for:

> 1) mistake, inadvertence, surprise, or excusable neglect, 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), 3) fraud, misrepresentation, or other misconduct of an adverse party, 4) the judgment is void, 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

> 6) any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b).

The letters from Appellant's creditors added no meaningful evidence to the original motion to dismiss. Affirmations of the debt to both of those creditors had already been attached to the original motion. (A.A. at 126.) Thus, the Bankruptcy Court was already aware that these creditors would not likely oppose a dismissal. The Court certainly cannot conclude that it was an abuse of discretion to refuse reconsideration on this basis.

Appellant also argues that Appellee's efforts to enter into a settlement between Appellant and ICA provided an additional basis for the Bankruptcy Court to reconsider its refusal to dismiss the case. According to Appellant's original Motion to Reconsider, "[t]he possible settlement of the pending suit destroys any speculation that **Grupo** ICA might in the future again become a substantial creditor of Mr. **Leslie**." (A.A. at 141.) This argument is a canard. Appellant was simultaneously opposing that very settlement. He cannot claim that his debts have been satisfied and concurrently seek to avoid the settlement, thereby reviving the potential debts. It seems clear, in fact, from the vehemence with which Appellant opposed the settlement, then and now, that he hoped to have the bankruptcy proceedings dismissed before the settlement was finalized so that he might further prosecute his action against ICA. Appellant's contention that the consummation of a settlement that he was fighting to prevent provided additional grounds for dismissing his bankruptcy is simply nonsensical.

Under these circumstances, the Motion for Reconsideration presented no new evidence and could not be

considered under the requirements of Federal Rule of Civil Procedure 60(b), as incorporated into Federal Rule of Bankruptcy Procedure 9024. The Motion for Reconsideration was a blatant effort by Appellant to submit a garden-variety appeal after the deadline for such an appeal had passed. The bulk of the arguments presented in that motion, and restated to this Court in the present motion (e.g., right to a jury trial, no remaining debt to administer) may or may not have been persuasive in a timely appeal of the denial of dismissal, but they are improper and worthy of no consideration in the context of a Motion for Reconsideration. Having elected to forego his opportunity to appeal, Appellant must live with the consequences and may not ignore concrete procedural restrictions.

For these reasons, the Motion for Reconsideration was properly denied.

B. Appellee's Motion to Approve Settlement was properly granted.

Once again, this Court must review the Bankruptcy Court's decision to approve the settlement for an abuse of discretion. *In re A & C Properties,* 784 F.2d 1377, 1380 (9th Cir. 1986). The court in *In re A & C Properties* described the test for determining whether a trustee's proposed settlement of a debtor's litigation is "fair and equitable." *Id.* at 1381. The bankruptcy court is to assess 1) the probability of success in the litigation, 2) the difficulties, if any, to be encountered in the matter of collection, 3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it, 4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *Id.*

1. The Bankruptcy Court's consideration of the reversed District Court decision was not error.

Appellant contends that the Bankruptcy Court improperly relied on the reversed District Court decision in weighing the probability of Appellant's success in his suit against ICA. This claim of error betrays a serious misunderstanding of the inquiry that the Bankruptcy Court was required to perform.

Appellant argues that because the Ninth Circuit ruled that summary judgment could not be premised on the apparent contradictions between Appellant's declarations and the contemporaneous correspondence of the parties, such contradictions were also not appropriately considered by the Bankruptcy Court in weighing the probability of success in the litigation. In Appellant's words, "[i]f the district court was not allowed to use this rationale in assessing the credibility of Mr. Leslie's lawsuit, why should the Bankruptcy Court be afforded the same privilege?" (Appellant's Opening Br. at 12.)

This argument misses the critical point that the appropriate inquiry in a summary judgment motion is whether any reasonable jury could conceivably rule for the plaintiff, whereas a Bankruptcy Court considering a settlement is forced to address what is likely to occur. Even if these extremely damaging letters do not guarantee Appellant's defeat, and therefore cannot be the basis for summary judgment, they unquestionably decrease Appellant's "probability of success in the litigation." Whatever competing evidence Appellant intends to offer, he may struggle to overcome the fact that he sent a letter stating that ICA had "acknowledged and reconfirmed on multiple occasions" that ICA would pay him a fee of $80,000 "in lieu of the other post procured project option of payout of a

base fee plus percentage of the first project." *Leslie,* 198 F.3d at 1155.

Furthermore, the basis of the Ninth Circuit's reversal of summary judgment was not one that would significantly speak to Appellant's probability of success. The Ninth Circuit did not dispute the fact that a significant volume of evidence flatly contradicted Appellant's claims, but rather held that unsworn contradictory evidence, no matter how voluminous, could not nullify sworn declarations for the purposes of summary judgment. The fineries of summary judgment jurisprudence take account of any hypothetical scenario for success, but when the Bankruptcy Court is called upon to make predictions, the remote possibility that a jury will disregard letters drafted by Appellant that directly undermine all his claims in the case cannot be accorded significant weight.

Appellant advanced the argument that the Ninth Circuit reversal verified the merit of his case during the December 1, 2000 hearing before Bankruptcy Judge Carlson. As the Judge succinctly stated during that hearing, "in a settlement, you have to anticipate what a trier-of-fact would do. We're no longer dealing with the technicalities of summary judgment. We're predicting." (Tr. of Dec. 1,2000 hearing at 8:20-22.) The Bankruptcy Court's consideration of the district court's preliminary findings was not only appropriate, it would have been a serious oversight to ignore the outcome of a fully briefed and argued summary judgment motion. Therefore, despite the Ninth Circuit's reversal, it was not error to give weight to Judge Walker's conclusions in the summary judgment order.

2. The amount of the settlement was well within the reasonable range Appellant could hope to collect.

Appellant lastly argues that the amount of the settlement in his favor is so low as to "fall below the lowest point in the range of reasonableness." (Appellant's Opening Br. at 14.) This argument stretches the bounds of credulity.

Appellant's first attempt to collect from ICA nearly resulted in an award of over $420,000 against him. This settlement gets Appellant 75% of his demanded flat-fee in exchange for Appellant foregoing the claim for a variable, percentage-of-first-project fee. Given that Appellant's own letters specifically acknowledge that the agreement did not include a variable fee, and the fact that Appellant is avoiding the possibility of an attorneys' fee award that would drive him into bankruptcy once again, this recovery seems like a substantial coup in Appellant's favor.

That is not to say that there is no conceivable scenario in which Appellant's recovery could be greater. But rather that it is absurd to assert that this recovery is so far out of the "fair and equitable" range as to constitute an abuse of discretion.

As to Appellant's claims that he has additional favorable evidence to which neither the Bankruptcy Court nor Appellee have accorded appropriate weight, there are two primary responses. First, as the Bankruptcy Court discussed at length in its on-the-record approval of the settlement, (Tr. at 16:21-21:8,) the decision whether to hold an evidentiary hearing at the eleventh hour is within the Bankruptcy Court's discretion. "The court may exclude evidence which is relevant where such evidence creates

undue delay, waste of time or needless presentation of cumulative evidence." *In re A & C Properties,* 784 F.2d at 1384. Where, as here, a fully briefed and argued summary judgment motion was resolved in such a one-sided manner, it may well have been a waste of judicial resources to allow Appellant to restart the factual inquiry.

Second, as Appellee noted during the original hearing and in his Opposition to this motion, Appellant insists upon making vague references to a tome of favorable evidence which will somehow overcome his contemporaneous letters, but refuses to memorialize such evidence in the form of declarations or other papers that can be evaluated in an efficient manner. Appellant claims this evidence was "never heard by the trial court," but fails to explain a) why this "critical" evidence was withheld or b) why Appellant continues to refer to it in broad, rather than particular terms. As before, the inquiry Appellant demanded of the Bankruptcy Court would have been inefficient and beyond the appropriate scope of review of a trustee's proposed settlement.

This Court cannot know for certain that no evidence tending to bolster Appellant's case exists or whether that evidence could be developed at trial, but given all the facts and circumstances, it is clear that the trustee struck a fair and equitable bargain. Appellant would face an uphill battle against ICA and, were he to lose, it appears he could not withstand another award of attorneys' fees. The trustee acted in the estate's best interests and the Bankruptcy Court's approval of the settlement was well within the bounds of sound discretion.

IV. *CONCLUSION*

For the foregoing reasons, the decision of the Bankruptcy Court is affirmed in full.

IT IS SO ORDERED.

APPENDIX E

198 F.3d 1152

United States Court of Appeals,
Ninth Circuit

Stephen LESLIE, dba Internacional Projects Development, Plaintiff-Appellant,

v.

GRUPO ICA; ICA Construction Co; ICA Internacional S.A. de C.V.; Andres Conesa Ruiz; Empresas ICA Sociedad Controladora S.A. de C.V., Defendants-Appellees.

No. 98-15181.

Argued and Submitted Aug. 12, 1999.
Filed Dec. 6, 1999.

James Dirks, Sacramento, California; David K. Sergi, San Marcos, Texas, for the plaintiff-appellant.

Andrea G. Asaro, Rosen, Bien & Asaro, San Francisco, California, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. No. CV-94-03059-VRW.

Before: THOMPSON and GRABER, Circuit Judges, and CARROLL, District Judge.[1]

DAVID R. THOMPSON, Circuit Judge:

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[1] The Honorable Earl H. Carroll, United States Senior District Judge for the District of Arizona, sitting by designation.

Stephen K. Leslie ("Leslie") appeals the district court's summary judgment dismissing his diversity action against ICA Construction Corporation, a Florida corporation; ICA Internacional, S.A. de C.V., and Empresas ICA, Sociedad Controladora, S.A. de C.V., both Mexican corporations; and ICA executive vice-president Andres Conesa Ruiz (collectively "ICA" or "Grupo ICA"). Leslie asserts that ICA breached an oral contract to pay him a $100,000 flat fee and a percentage-based fee of more than $1,250,000 for facilitating an introduction between ICA and Perini Corporation, who then formed a joint venture for a construction project. Although the district court recognized that Leslie's deposition testimony and sworn declaration were sufficient, if believed, to survive summary judgment, the court concluded that Leslie's self-serving assertions were so contradicted by Leslie's correspondence with ICA as to be unbelievable. On that basis, the district court granted summary judgment in favor of ICA.

We have jurisdiction under 28 U.S.C. § 1291, and we reverse the district court's summary judgment. We affirm, however, the district court's denial of Leslie's motion for recusal. We lack jurisdiction over, and do not address, the district court's award of attorney fees and costs to ICA.

FACTUAL BACKGROUND

The dilemma at the heart of this case is that the plaintiff, Leslie, created two parallel versions of the facts. In his deposition and declaration, he presents a fairly straightforward tale of ICA's breach of an oral contract to pay him a flat fee of $100,000 and a percentage of the ICA-Perini joint project. On the other hand, a long trail of letters from Leslie to ICA appears to show that ICA and Leslie neither formed a contract nor even discussed some of the terms upon which Leslie alleges they agreed.

The parties agree that Leslie aided ICA in forming a joint venture between ICA and Perini Corporation, a major U.S. engineering and construction company. In October 1991, Leslie arranged a meeting between ICA and Perini executives. At about that time, Perini agreed to pay Leslie $35,000 if a joint venture between Perini and ICA was ultimately formed. In February 1992, ICA, Perini, and a third company formed a joint venture. In early June 1992, the ICA-Perini joint venture won the bidding process for a tunnel project in Chicago valued at $168 million. Perini paid Leslie $35,000. On several occasions before Leslie filed this action, ICA also offered to pay Leslie $35,000, but Leslie rejected that offer.

According to Leslie's deposition testimony and sworn declaration, an ICA executive first approached Leslie in 1990 for help in forming a joint partnership between ICA and a major U.S. engineering and construction company. In December of that year, Leslie met with ICA executive Gumaro Lizarraga, and they agreed that ICA would pay Leslie five percent of ICA's gross portion of the first successfully bid joint venture project, plus a flat fee of $100,000. Two other ICA executives later reaffirmed that agreement.

Again, according to Leslie's deposition and declaration, ICA executive vice-president Andres Conesa Ruiz ("Conesa") renegotiated Leslie's contract just before the October 1991 meeting between executives of ICA and Perini. Leslie says that he and Conesa modified Leslie's compensation from a one-time fee for a single joint venture of five percent plus $100,000 to a fee of three percent per joint venture plus a $35,000 one-time fee. Leslie submitted to the district court a letter "memorializing" this agreement which he allegedly delivered to Conesa at the October

1991 meeting. Although an ICA representative later attempted to renegotiate Leslie's flat fee, according to Leslie, the representative assured him that ICA would pay the percentage fee. After the ICA-Perini joint venture's first successful bid on the Chicago project, ICA refused to pay Leslie more than a $35,000 flat fee.

Correspondence between Leslie and ICA appears to tell a different story. Although Leslie asserted in this litigation that he had an oral contract with ICA in 1990, his correspondence suggests he did not. He wrote to an ICA executive in September 1991 stating: "If ICA and Perini form a working association, I would at that time like to receive financial recognition .... The terms and amount . . . will be reasonable and be negotiated jointly by ICA and Perini with me ...." During 1991 and 1992, Leslie and ICA exchanged numerous letters and draft contracts, all of which address a one-time flat fee without reference to a percentage fee. Leslie insisted in one letter that "[t]o be proper and in force the final letter contract must be on company letterhead and signed in ink."

After the ICA-Perini venture won the Chicago project in 1992, Leslie wrote to ICA stating that ICA and Leslie "ha[d] not yet executed [a] contract." He submitted with the letter a draft contract for a $50,000 flat fee. A few months later, Leslie wrote to Conesa, insisting that Leslie and ICA had agreed "that if ICA delayed signing of my fee contract until after a joint project with Perini was procured, that my fee would raise significantly to [$80,000]." The letter also stated: "Normally the compensation for such services would be a base fee plus a percentage of the valuation of the ICA percentage of the first procured ICA-Perini joint project .... I selected the flat fee in deference to a request from [ICA]." Leslie sent a similar letter to

another ICA executive, stating that ICA had "acknowledged and reconfirmed on multiple occasions" that ICA would pay him a fee of $80,000 and that the $80,000 fee was "in lieu of the other post procured project option of payout of a base fee plus percentage of the first project."

Finally, in November 1992, Leslie wrote to ICA's chief executive officer, Gilberto Borja Navarrette. The letter stated: "ICA owes me two fees for my ICA commissioned work .... The fees were agreed to by [Conesa] .... The developmental/finder fee is a one-time $1,259,250.00 U.S. fee. The ICA-Perini joint venture supplemental fee ... is $80,000.00 US."

Leslie attempts, particularly in his sworn declaration, to reconcile the inconsistencies between his current version of events and his prior letters. Leslie asserts that ICA, through an employee who was Leslie's friend, assured Leslie throughout the relevant period that ICA would pay the percentage fee even though ICA tried to reduce the amount of Leslie's flat fee. Leslie contends that this explains why none of his letters refers to a percentage fee. He adds that some of his letters "were written in haste ... with little if any proofreading," were intended merely to stall ICA's attempt to renegotiate the flat fee, or reflected oral understandings not explicitly discussed. Finally, he asserts that by 1992 he "was desperate, suffering from severe emotional stress and greatly depressed due to [his] dire financial straits and [his] dawning realization that ICA might try to avoid paying [him] what [he] was owed ...." As a result, he says that his writing became "garbled and confused" and focused exclusively on immediate payment of his flat fee. ICA contends these assertions amount to nothing more than a feeble attempt to explain away hard facts that belie Leslie's claims.

PROCEDURAL HISTORY

On June 1, 1994, Leslie, *in pro per,* filed this action against ICA in state court in San Francisco. ICA removed the action to federal court on the basis of diversity jurisdiction. In Leslie's current amended complaint, he asserts claims for breach of oral and written contract, quantum meruit, promissory estoppel, false promise, and negligence.

The history of this action, like the underlying facts, is tortured. Leslie has been through four sets of attorneys, two sets of whom withdrew because of ethical conflicts. The district court has given Leslie numerous extensions of time and has accepted filings after deadlines. The district court has imposed monetary sanctions on three of Leslie's various attorneys. At one point, the district court entered summary judgment in favor of ICA on the ground that Leslie had failed to file his opposition to ICA's motion on time. The district court reconsidered after Leslie filed a motion accompanied by a declaration from one of his attorneys, Timothy F. Perry, in which Perry stated that his ability to represent Leslie had been impaired by attention deficit disorder and substance abuse. The summary judgment order was vacated, and Leslie's tardy submissions were considered. The court then granted the summary judgment that is the subject of this appeal.

The district court recognized that ICA had "not disputed that Leslie's testimony, if believed, would be sufficient evidence of an oral contract to survive summary judgment." After reviewing the record in detail, however, the court stated that "the only reasonable conclusion to be drawn from the evidence in this case is that Leslie has committed perjury and manufactured evidence." In light of

the extensive documentary evidence flatly contradicting Leslie's deposition and declaration, the court concluded: "Because no reasonable jury could possibly conclude that an oral contract existed between Leslie and ICA, defendants' motion for summary judgment as to [Leslie's contract claim] is granted." For similar reasons, the district court then granted summary judgment in favor of ICA on Leslie's other causes of action.

Leslie filed a Motion for New Trial and Relief from Judgment, under Federal Rules of Civil Procedure 59(e) and 60(b), arguing that the district court had applied an incorrect legal standard in granting ICA's motion for summary judgment. In support of the motion, Leslie submitted additional deposition testimony and declarations, which he argued corroborated his versions of the facts. The district court denied Leslie's motion.

Leslie also filed a Suggestion of Disqualification and Motion for Recusal. Leslie argued that the district court's suggestion that he had fabricated evidence and committed perjury established bias. The district court denied the recusal motion.

Leslie then filed a timely notice of appeal from the district court's order granting summary judgment to ICA. After Leslie failed to file an opening brief, despite an extension of time to file, we dismissed the appeal for lack of prosecution.

In the meantime, the district court awarded ICA a total of $428,421.49 in attorney fees and costs, which included $228,069.64 awarded against Leslie's then-attorneys, David K. Sergi and Timothy F. Perry. Leslie and his attorneys filed an untimely notice of appeal from that award of fees. After Leslie and his attorneys failed to

respond to an order to show cause why the fees appeal should not be dismissed for lack of jurisdiction, we dismissed it.

Several months later, Leslie filed a motion to reinstate both of his appeals. His motion was based on the same ground Leslie had used to get the district court to set aside its first summary judgment order. Leslie once again asserted that his attorney, Perry, suffered from mental illness and had abused the prescription drug Ritalin. Leslie attached to his motion the same declaration that Perry had filed previously in the district court. We granted Leslie's motion to reinstate his appeal from the district court's summary judgment. Leslie's appeal from the district court's attorney fee award remains closed.

DISCUSSION

I.

Standards of Review

We review de novo a grant of summary judgment. *See Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir.1998). We must determine, viewing the evidence in the light most favorable to Leslie, whether any genuine issue of material fact exists and whether the district court correctly applied the relevant substantive law. *See id.* We review for abuse of discretion the denial of a motion under either Federal Rule of Civil Procedure 59 (new trial) and under Rule 60(b) (relief from judgment). *See School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.,* 5 F.3d 1255, 1262 (9th Cir.1993). We also review for abuse of discretion the denial of a recusal motion. *See United States ex rel. Hochman v. Nackman,* 145 F.3d 1069, 1076 (9th Cir.1998).

II.

Summary Judgment

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Supreme Court explained that "the inquiry performed [at summary judgment] is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." The Court explained, however, that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. 2505.

Despite the Supreme Court's clear pronouncement limiting the scope of summary judgment, other circuits have carved out various exceptions under which a court may disregard self-serving and incredible testimony or affidavits. *See, e.g., Seshadri v. Kasraian,* 130 F.3d 798, 802 (7th Cir.1997) (explaining circumstances under which "testimony can and should be rejected without a trial [because] no reasonable person would believe it"); *Johnson v. Washington Metro. Area Transit Auth.*, 883 F.2d 125, 128 (D.C.Cir.1989) ("The removal of a factual question from the jury is most likely when a plaintiff's claim is supported solely by the plaintiff's own self- serving testimony, unsupported by corroborating evidence, and undermined either by other credible evidence, physical impossibility or other persuasive evidence that the plaintiff has deliberately committed perjury.").

In cases that ICA contends are similar to the present one, we have held that a court may disregard a "sham" affidavit that a party files to create an issue of fact by contradicting the party's prior deposition testimony. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991) ("'[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact'" (quoting *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1462 (9th Cir.1985))); *cf. Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, – –, 119 S.Ct. 1597, 1603-04, 143 L.Ed.2d 966 (1999) (recognizing, without endorsing, similar "sham affidavit" holdings of every circuit).

In the present case, Leslie's letters to ICA appear to contradict his assertion of a contract entitling him to a percentage fee. This is different, however, from our "sham affidavit" cases, because Leslie's deposition testimony and sworn declaration in this case are consistent and are contradicted only by Leslie's unsworn letters. *See Shockley v. City of Newport News*, 997 F.2d 18, 23 (4th Cir.1993) (explaining that a sworn affidavit is not a "sham" merely because it contradicts unsworn letters). Additionally, Leslie's deposition testimony and sworn declaration seek to explain his prior statements. *See Messick v. Horizon Indus., Inc.*, 62 F.3d 1227, 1231 (9th Cir.1995) (stating that, even under the "sham affidavit" doctrine, "the nonmoving party is not precluded from elaborating upon, explaining or clarifying prior testimony" and that "minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit"); *see also Seshadri*, 130

F.3d at 804 (recognizing "that a party might be able to explain away his prior inconsistent statements" and stating that a party should be bound by such statements only if they are unexplained). Here, as the district court acknowledged, if Leslie's deposition testimony and sworn declaration are believed, his claims may not be dismissed on summary judgment.

In *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626 (9th Cir.1987), we explained that, "at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *Id.* at 630-31 (citations omitted). We specifically rejected the notion that a court could disregard direct evidence on the ground that no reasonable jury would believe it. *See id.* at 631 n. 3 ("Were we to construe the [Supreme] Court's statements as requiring a court to ask whether a jury could find in favor of the nonmoving party viewing all of the evidence – both that presented by the nonmoving party and that presented by the moving party – such a construction would contradict the clear instruction that a court may not weigh the evidence or assess its credibility.").

Contrary to ICA's contention, we have applied these principles to preclude summary judgment in cases similar to this one. In *McLaughlin v. Liu,* 849 F.2d 1205, 1207-08 (9th Cir.1988), we reversed a district court's summary judgment in favor of the plaintiff where the court disregarded the defendant's sworn declaration and sworn answers to interrogatories as "implausible." The case was an action predicated on an employer's violation of the

overtime pay provisions of the Fair Labor Standards Act ("FLSA"). In support of its motion for summary judgment, the government presented the defendant employer's records for the pay period ending April 6, 1985, demonstrating that he did not pay overtime during that period. *See id.* at 1206. The government also submitted the defendant's answers to interrogatories admitting that those individuals who were paid on a piecework basis "were paid only piecework," which implied that the defendant did not pay them overtime. *See id.*

In opposition, the defendant relied on his own declaration that he had paid overtime premiums for piecework for all periods except for the period ending April 6, 1985, and during that period he had deviated from his practice on the mistaken advice of an accountant friend. *See id.* He also attached a "piecework register" purporting to show proper payments of overtime. *See id.* In violation of FLSA regulations, however, he had destroyed all records of his employees' piecework earnings. *See id.* at 1207 n. 5. The district court suggested that the "register" might not have been prepared until after the litigation began. *See id.* We reversed the district court's summary judgment, explaining:

> [The defendant's] sworn statements that he calculated and paid overtime in accordance with the requirements of law are direct evidence of the central fact in dispute. [The defendant] does not ask that inferences be drawn in his favor, but that his testimony be taken as true. To this he is clearly entitled under *Anderson* ("The evidence of the non-movant is to be believed," 477 U.S. at 255, 106 S.Ct. 2505) and a host of other decisions. Summary judgment cannot be justified in the face of such evidence.

Id. at 1207-08; *see also Eisenberg v. Insurance Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir.1987) ("[W]e find that the district court's grant of summary judgment was unwarranted .... [The non-movant's] declaration is to be accepted as true .... [The non-movant's] evidence should not be weighed against the evidence of the [movant]."); *Foster*, 772 F.2d at 1460-61 ("In her deposition and subsequent declaration in opposition to Arcata's motion for summary judgment, Foster states facts which, if true, could justify an inference that she was qualified for Hamby's position .... Such factual issues may not be resolved in favor of the moving party on summary judgment when, as here, the adverse party has supported its position by evidentiary materials as provided in Rule 56. It is enough that these materials consist of the party's own sworn deposition testimony and declaration in opposition to the motion for summary judgment.").

Although we can understand the district court's disbelief of Leslie's assertions in his deposition and sworn declaration, such disbelief cannot support summary judgment. The district court based its summary judgment dismissal of Leslie's breach of oral contract, breach of written contract, and quantum meruit claims on the court's rejection of Leslie's evidence. Contrary to ICA's contention, Leslie's evidence raises genuine issues of fact as to these claims. If Leslie's evidence is believed, he and Conesa had a "meeting of the minds" creating a contract in October 1991. As to the quantum meruit claim, if Leslie's evidence is believed, he provided services to ICA that were worth more than the $35,000 he refused to accept. Thus, those issues must be resolved at trial. Similarly, although the district court's summary judgment dismissal of Leslie's promissory estoppel and negligence claims did not rely

directly on the rejection of Leslie's evidence, in concluding that Leslie proffered no evidence that he had been damaged, the district court used the same analysis to value Leslie's services that it used to dismiss his quantum meruit claim. That analysis was premised on a disbelief of Leslie's assertion of the agreed-upon value of his services.

In sum, the district court's summary judgment must be reversed. Because we reverse that judgment, we do not address Leslie's challenges to the district court's order denying his motion for a new trial and relief from judgment.

III.

Recusal

After the district court granted summary judgment in favor of ICA, and while Leslie's other post-judgment motions were pending, Leslie moved to disqualify the district court judge under 28 U.S.C. § 455(a) on the ground that the comments the judge had made in the summary judgment order demonstrated a lack of impartiality. Section 455 imposes an affirmative duty upon judges to recuse themselves when "'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir.1993) (quoting *In re Yagman*, 796 F.2d 1165, 1179 (9th Cir.1986)). We review for abuse of discretion a district court's denial of a recusal motion. *See id.*

The provisions of section 455 "require recusal only if the bias or prejudice stems from an extrajudicial source and not from conduct or rulings made during the course of the proceeding." *Toth v. Trans World Airlines, Inc.*, 862

F.2d 1381, 1388 (9th Cir.1988). In *Liteky v. United States,* 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474, (1994), the Supreme Court further explained the narrow bases for recusal:

> Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion .... [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555, 114 S.Ct. 1147.

Leslie's allegations stem entirely from the district court judge's adverse rulings. That is not an adequate basis for recusal. *See, e.g., United States v. Hernandez,* 109 F.3d 1450, 1454 (9th Cir.1997); *Taylor v. Regents of the Univ. of Cal.,* 993 F.2d 710, 712-13 (9th Cir.1993); *Toth,* 862 F.2d at 1388. The district court did not abuse its discretion in denying Leslie's recusal motion. In fact, the procedural history of this case reveals that the district court has been extremely indulgent of Leslie, repeatedly granting extensions of time, accepting late-filed pleadings, granting an untimely motion to amend Leslie's complaint, and reinstating Leslie's action after its initial dismissal.

IV.

Attorney Fees

The district court awarded ICA its reasonable attorney fees and costs. Part of this award was assessed solely against Leslie on the ground that ICA was the prevailing party. Part of this award was assessed against Leslie's attorneys for bad faith litigation. Leslie and his attorneys filed an untimely notice of appeal of the district court's order awarding fees to ICA. After Leslie failed to respond to an order to show cause why that appeal should not be dismissed for lack of jurisdiction, we dismissed it. That appeal remains closed. Leslie, however, raises the issue of the fees award at the end of his opening brief in this present appeal, arguing that, if we reverse the district court's summary judgment, we should also reverse its award of attorney fees. We reject this argument.

We lack jurisdiction to review an order granting attorney fees unless a proper notice of appeal is filed. *See Farley v. Henderson,* 883 F.2d 709, 712 (9th Cir.1989); *Culinary & Serv. Employees Union, Local 555 v. Hawaii Employee Benefit Admin.,* 688 F.2d 1228, 1232 (9th Cir.1982). The award of fees and costs is a collateral issue, *see Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), and our appellate jurisdiction over the merits of Leslie's appeal from the district court's summary judgment does not imbue us with jurisdiction to review the fee award. Because the notice of appeal from the fee award was untimely, we lack jurisdiction to review that award, and the appeal was properly dismissed. *See Hasbro Indus., Inc. v. M/S St. Constantine,* 705 F.2d 339, 343 (9th Cir.1983).

CONCLUSION

Because a party's consistent deposition testimony and sworn declaration supporting his claim and explaining inconsistent unsworn statements must be credited at the summary judgment stage, the district court erred in granting summary judgment in favor of ICA. Accordingly, we reverse that judgment. We affirm, however, the district court's denial of Leslie's motion for recusal; we do not address the district court's award of attorney fees and costs to ICA. Each party shall bear its own costs on appeal. AFFIRMED in part, REVERSED in part and REMANDED.